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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 131

J. W. WHITEHOUSE, Et Al.,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Et Al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION

KENNETH F. BURGESS,
WALTER J. CUMMINGS, JR.,
Attorneys for Respondent Carrier Members, National Railroad Adjustment Board, Third Division.

SIDLEY, AUSTIN, BURGESS & SMITH,
11 S. LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

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OPINION BELOW

The district court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 35-41. The opinion of the court of appeals (R. 45-60) is reported in 212 F. 2d 22.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on March 19, 1954 (R. 60). The petition for a writ of certiorari was filed on June 11, 1954, and was

granted on October 14, 1954 (R. 63). The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

QUESTIONS PRESENTED

1. When a union files a contractual claim with the National Railroad Adjustment Board to certain railroad work being performed by a member of another union also having a contract with the railroad, whether Section 3 First (j) of the Railway Labor Act requires the Board to give due notice and an opportunity to be heard to the incumbent and his union.

2. When the Board refuses to give due notice and an opportunity to be heard, whether the courts may enforce the statutory command.

STATUTE INVOLVED

Section 3 First (j) of the Railway Labor Act (45 U. S. C. 153 First (j)) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT

In June 1951, petitioner Order of Railroad Telegraphers (herein referred to as Telegraphers) instituted a proceeding in the National Railroad Adjustment Board, Third Division (herein referred to as the Board), claiming work at Palestine, Illinois, on the line of respondent Illinois Central Railroad. That work is presently being done by D. A. Shears, a member of the Brotherhood of Railway and Steamship

Clerks, Freight Handlers, Express and Station Employes (herein referred to as Clerks). (R. 28, 36.)

After the Telegraphers' claim was docketed by the Board, the Clerks wrote the respondent carrier that the work in question was covered by a contract between the Clerks and the Carrier, and that if the Telegraphers were successful in their claim before the Board, the Clerks would present to the Board a claim to the same work (R. 30-31, 38).

In August 1951, the respondent carrier filed its submission with the Board, stating, *inter alia*, that the work was being done by a member of the Clerks, that the work was of the type customarily performed by clerical forces, and that the claim should be dismissed unless the Board permitted each organization to present the full facts of the case (R. 28, 36-37).

The ten-member Board deadlocked on the merits of the case (R. 46). Consequently, the National Mediation Board appointed a referee to resolve that deadlock, pursuant to Section 3 First (1) of the Railway Labor Act (R. 27, 36).

On May 13, 1953, when the case came on for hearing before the Board and the Referee, the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered for the first time (R. 28-29, 37).

The due notice point was the subject of a motion of a respondent Carrier Member, who objected to proceeding with the case until due notice was served on "the Brotherhood of Railway Clerks, or constituents thereof" (R. 18, 19-20, 28-29, 37). He pointed out that the Clerks had warned the respondent carrier of their intention to prosecute a claim to the same work involved in the proceeding before the Board in the event that the Telegraphers' claim were sustained by the Board (R. 18).

Pursuant to its custom when considering matters of procedure, the Board excluded the Referee from consideration of the due notice question (R. 20, 29, 37). At this executive session of the Board, the Carrier Member's motion that the Board not proceed with the claim "for want of jurisdiction" resulted in a tie vote and therefore failed to carry (R. 19, 20, 29, 37).

The public session of the Board was then reconvened with the Referee present. In accord with the usual practice of the Board, the Referee was not requested to vote on the due notice question, nor did he request an opportunity to do so. (R. 18-19, 29, 37.)

After the public session reconvened, a respondent Carrier Member again objected to proceeding until due notice had been given pursuant to Section 3 First (j) of the Railway Labor Act. Nevertheless, the hearing was resumed. (R. 29, 37.)

On May 22, 1953, the respondent carrier filed a verified Complaint (R. 1) and thereafter moved for an order directing the defendants to serve due notice on the incumbent D. A. Shears and the Clerks or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 3).

In the Complaint, the respondent carrier alleged that the Board has for several years denied the right of participation of any persons not formally served with notice, and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 30).

The Complaint pointed out that the Telegraphers were seeking to obtain a favorable Award on their claim, with no notice to the Clerks, and that the Clerks would then in turn seek a favorable Award, with no notice to the Teleg-

raphers.[1] Thus the Telegraphers and Clerks would endeavor to compel the respondent carrier to employ two persons simultaneously on one job. (R. 31.)

The five respondent Carrier Members of the Board filed an Answer admitting that under Section 3 First (j) of the Railway Labor Act due notice must be given to D. A. Shears and the Clerks. Their Answer showed that the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 16), and also showed that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill., 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954), on the ground that this Division's failure to give due notice deprived employees of their constitutional and statutory rights. (R. 16-17, 23-35, 51.)

In their Answer, which was supported by six exhibits (R. 18-26), the five respondent Carrier Members asserted that they are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 17).

The Carrier Members disclosed that only persons receiving formal notice from the Board pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 17-18).

The district court entered findings of fact and conclusions of law in favor of the respondent carrier (R. 35-40). Accordingly, a preliminary injunction was awarded which enjoined the Board from proceeding with this claim (1) until the Board gives formal notice to D. A. Shears and

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1. A chain of events of this very kind was described in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 303 (C. A. 7, 1951).

the Clerks, and (2) until the Board permits them to participate in the proceedings (R. 40-41).

Intervenor Telegraphers and the Labor Members appealed from the order of the district court insofar as it applied to individual Board members (R. 42), but the Board did not appeal (R. 49). The court of appeals affirmed the order of the district court, Judge Swaim dissenting (R. 45-60).[2]

In January of this year, some of the members of the Railway Labor Executives' Association moved to file a brief amici curiae herein. Respondents did not consent to the filing of the brief because the points therein have already been made by the petitioner Order of Telegraphers, which is a member of that Association, and because the proposed brief of the amici curiae does not represent the viewpoint of railroad labor as a whole. Not a single operating union has authorized its name to be used by the amici.

Among others, the following important members of the Railway Labor Executives' Association failed to join in the aforesaid motion: the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, and the Switchmen's Union of North America. Likewise, 22 other railroad labor organizations did not join therein, including the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen.

The aforesaid Brotherhood of Railroad Trainmen, one of the oldest and strongest of all unions, agrees with the position of respondents, for it successfully filed a similar

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2. It may be noted that Judge Swaim concurred in the subsequent opinion in *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954), which required the district court at the Brotherhood's behest to order the Board to give due notice to express-messengers and permit them to participate before the Board.

mandamus action against the First Division of the Board *(Brotherhood of Railroad Trainmen* v. *Swan,* 214 F. 2d 56 (C.A. 7, 1954)), and that Division now gives statutory notice to incumbents and their unions in dockets such as the instant one (see R. 21-23).

Although this Court has not yet acted on the motion of the amici, the arguments of the proposed brief of the amici have been answered herein.

Because the National Railroad Adjustment Board is a unique agency, and because there has been very little literature on its operations, the respondent Carrier Members call the Court's attention to the two most recent articles to analyze these operations: Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis" (1952) 5 Industrial & Labor Relations Rev. 365, beginning particularly at 372 ff.; "Railroad Labor Disputes and the National Railroad Adjustment Board" (1951) 18 Univ. of Chicago L. Rev. 303, beginning particularly at 308 ff.

SUMMARY OF ARGUMENT

I.

When a union files a contractual claim with the National Railroad Adjustment Board to certain railroad work being performed by a member of another union also having a contract with the railroad, Section 3 First (j) of the Railway Labor Act requires the Board to give the incumbent and his union notice and an opportunity to participate. Except for an inapplicable and overruled decision by the Eighth Circuit, all the cases, representing the views of 26 federal judges, have so interpreted the statute.

If Congress had intended that notice and an opportunity to be heard should be limited to parties, the statute would have said so. Instead, it provides that notice of hearings should be given to "employees * * * involved in any dispute submitted" to the Board by the parties.

The incumbent is an "employee involved" because he will be displaced if the claimants are successful. Similarly, his union is involved, for it has already stated that it will prosecute a claim to the same work, and the legislative history of the statute shows that it should be given an opportunity to be heard. The Department of Justice has refused to represent the Board in due notice litigation on the ground that the Board's failure to give due notice deprives employees of constitutional and statutory rights. After giving the statutory notice and an opportunity to be heard to the incumbent and his union, and after considering custom, practice, and usage under the agreements, the Board should decide which of the two collective bargaining agreements applies to this work, or whether both do, thus avoiding an additional dispute brought by the Clerks.

II.

Formal notice to the incumbent and his union is necessary because the Board would not permit them to participate in the proceedings if they merely had actual notice.

III.

The preliminary injunction was warranted because the Board has already voted not to give the statutory notice. The respondents have already exhausted the administrative process on this matter. Even if the referee had subsequently voted that notice be given, no notice would have issued, for the practice of the Board is not to give notice unless the Board is unanimous.

The rule requiring the exhaustion of administrative remedies does not apply (1) where, as here, the administrative body has failed to comply with the governing statute and has, therefore, acted without statutory authority, or (2) where the defect urged goes to the jurisdiction of the administrative agency. See, *e.g.*, *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557.

The Board's persistent deadlock on due notice has increased the number of unresolved claims and is the kind of "judicial frustration on an administrative level" appropriate for resolution by the court. *Order of Railway Conductors* v. *Swan*, 329 U. S. 520. Judicial relief is necessary to rectify the Board's flagrant disregard of the notice requirements of Section 3 First (j).

No case has held that when the Board fails to give due notice, the only remedy available to the carrier is to defend an enforcement suit filed within two years after an award is issued. Defending an enforcement suit would not result

in the serving of notice, and it would still be necessary to file another action like the present one in order for due notice to be given. Moreover, incumbents and their unions would not be parties to an enforcement suit, so that a court would not know their views and no binding adjudication could be made.

For lack of notice to the incumbent and his union, a "denial award" in the carrier's favor would be void and afford it no protection. Since the denial award would be void, the member of the Telegraphers who is seeking this work, or the Telegraphers, would feel free to file an identical claim or to exert strike threats against the carrier.

If a void "sustaining award" on the merits issues against the carrier, experience teaches that economic duress may be asserted against the carrier instead of the filing of an enforcement suit. Yet a carrier should not have to comply with invalid awards to avoid labor unrest and then have to pay retroactively other claimants who subsequently obtain valid awards after due notice has been given.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the carrier would not be afforded protection in complying with an award in favor of the claimant union. But a carrier should be entitled to have this controversy settled once and for all in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards.

Relief in the nature of mandamus is necessary to cause the Board to give the notice required by the Railway Labor Act, and it is well settled that the courts have jurisdiction to enforce the commands of that statute. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. The statu-

tory right to due notice embodies elemental notions of justice and fair play. To deny those most vitally concerned in the controversy the right to be heard subverts principles fundamental to the administration of the law.

IV.

The writ of certiorari should be dismissed because of several features appearing in the record of this case.

The petition for certiorari was not presented by the Board but only by five individual members of the Board, who do not constitute a majority of the Board and do not purport to be acting for the Board. Public policy and judicial convenience weigh against allowing individual members to carry a case through the courts when the agency itself did not appeal. Moreover, the appeal in this case concerned only the injunction against these individual members and not the injunction against the Board, so that this Court does not have before it the subject matter discussed in the briefs.

The Order of Telegraphers, the only other petitioning party, is an intervenor that was not sued, was not enjoined, and does not have an independent right which will support an appeal. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632; *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577.

ARGUMENT

I. THE BOARD IS REQUIRED TO GIVE DUE NOTICE AND AN OPPORTUNITY TO BE HEARD TO THE INCUMBENT AND HIS UNION.

The nub of this case is: Should a railroad employee and his union, under Section 3 First (j) of the Railway Labor Act, be given notice by the Board and an opportunity to be heard in proceedings initiated by another union trying to take the work from him?

The Board consists of five carrier members and five labor members. When a union files a contractual claim with the Board to certain railroad work being performed by a member of another union also having a contract with the railroad, it is the Carrier Members' position that Section 3 First (j) of the Railway Labor Act requires the Board to give the incumbent and his union notice and an opportunity to participate in the hearings. Then the Board may properly consider both contracts in the light of custom, practice and usage under each of them to determine which applies to the work, or whether both do. When, as here, the Board refuses to give the requisite notice, judicial relief is needed so that the Board will comply with the statutory mandate. Twenty years' experience has shown that there is no other way to secure an observance of the notice requirements of the Act.

In the proceedings before the Board, notice was not given by the Board to the Clerks (R. 37), who claim that their contract covers the Palestine, Illinois, work (R. 30-31, 38), nor to the incumbent clerk whose job is at stake, D. A. Shears (R. 37), despite the requirements of Section 3 First (j) of the Railway Labor Act that:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and *the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees* and the carrier or carriers *involved in any dispute submitted to them.*" (Italics supplied.) (45 U. S. C. 153 First (j).)

The holding of the courts below that Section 3 First (j) requires the Board to give due notice of its proceedings to the incumbent of the position and his union accords with the decisions in other circuits. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C.A. 3, 1951); *Estes* v. *Union Terminal*, 89 F. 2d 768 (C.A. 5, 1937); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823.[3] The respondent Carrier Members, who comprise half the Board, sought to comply with this statutory obligation and the decisions of 26 federal judges who have thus interpreted the statute.

Petitioners are mistaken in their statement that until this case it has never been suggested, administratively or judicially, that an incumbent was entitled to notice (Br. 35). That question was first decided in *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7, 1936), certiorari denied, 300 U. S. 673,

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3. To the same effect, see *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954); *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7, 1954); *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway Trainmen and Steamship Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 171 F. 2d 594 (C. A. 7, 1948), certiorari denied, 337 U. S. 916; *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7, 1936), certiorari denied, 300 U. S. 673; *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 26 Labor Cases ¶ 68,622 (E.D. Mo., 1954); *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654 (N.D. Ill., 1954); *Brand* v. *Pennsylvania Railroad*, 2 Labor Cases 179 (E.D. Pa., 1939). The reason for so many cases in the Seventh Circuit is that the Board's members and officers are in Chicago, Illinois (see Section 3 First (r) of the Railway Labor Act).

and all subsequent cases have followed that pioneer decision except for an inapplicable decision in the Eighth Circuit which did not discuss Section 3 First (j) and which has since been overruled (see below). Moreover, numerous awards of the Board are to the same effect (see p. 43, *infra*), and even the motion of the amici curiae refutes (at p. 3) the petitioners' statement that this is the first such case.

The Telegraphers' submission to the Board demands that the work now being performed by the incumbent clerk Shears be transferred to the Telegraphers' agreement. If the Board sustains the claim of the Telegraphers, it will necessarily transfer the work from the incumbent Shears, who is subject to the Clerks' agreement, to a telegrapher who is subject to the Telegraphers' agreement. That being so, Shears and the Clerks would be adversely affected by the award and therefore should be given notice and opportunity to be heard.

To say that the incumbent and his union are not "employees involved" within the meaning of Section 3 First (j) "is so unrealistic as to be absurd." *Hunter* v. *Atchison, T. & S. F. Ry Co.*, 188 F. 2d 294, 300 (C.A. 7, 1951), certiorari denied, 342 U. S. 819. The only allegedly contrary authority, relied upon by petitioners (Br. 28-30), is *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 61 F. Supp. 869 (E.D. Mo., 1945), affirmed, 156 F. 2d 1 (C.A. 8, 1946), certiorari denied, 329 U. S. 758. However, that case was overruled by *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823, where it was unsuccessfully relied upon by the appellant. The recent case of *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 26 Labor Cases ¶ 68,622 (E. D. Mo., 1954), was decided pursuant to the *Templeton* case rather than pursu-

ant to the earlier *New Orleans, Texas & Mexico Railway* case. Petitioners attempt to distinguish the *Templeton* case from the earlier *New Orleans, Texas & Mexico Railway* case on the asserted ground that the baggagemen's work was not covered by a contract in the *Templeton* case (Br. 32), but such distinction was not made by the court, and the baggagemen had a contract with one of the carriers. Moreover, instead of discussing the notice requirement of Section 3 First (j), the overruled *New Orleans, Texas & Mexico* holding was predicated on the erroneous conclusion that the Board has no jurisdiction to decide claims of this type (see 61 F. Supp. at pp. 878-879; 156 F. 2d at p. 5). It has been decided that the Board does have such jurisdiction. *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Brennan* v. *Delaware, L. & W. R. Co.*, 303 N. Y. 411, 103 N. E. 2d 532 (1952), certiorari denied, 343 U. S. 977.

Petitioners contend (Br. 27-38) that the phrase "employees involved" in Section 3 First (j) covers only the claimant union and the carrier. Such a construction is at war with the wording of the Section, which was construed as follows in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 734-735:

> "* * * § 3 First (j) not only requires the Board to give 'due notice of all hearings *to the employee* . . . involved in any dispute *submitted* . . .,' but provides for 'parties' to be heard 'either *in person*, by counsel, or by other representatives, as they may respectively elect.'
>
> "These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be

> heard 'in person.' Nor would the provision for notice *'to the employee . . .* involved in any dispute' be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose." (Court's italics.)

If Congress had intended that notice and an opportunity to be heard should be limited to parties, the statute would have said so. Instead, it provides that notice of hearings should be given to "employees * * * involved in any dispute submitted" to the Board by the parties. Congress made no attempt to restrict the hearings to the claimant and carrier but realized that others might be interested persons with a right to notice and hearing.

It is impossible to conceive of anybody more entitled to notice and hearing than an incumbent employee whose job is sought in a claim and the union that holds the contract to which he is subject. The relief the Telegraphers are requesting from the Board would result in D. A. Shears' displacement. "We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees" (*Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 306 (C.A. 7, 1951)). "Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him" (*Hunter* v. *Atchison, T. & S. F. Ry. Co.,* 188 F. 2d 294, 300 (C.A. 7, 1951), certiorari denied, 342 U. S. 819). Therefore, it is obvious that the incumbent is entitled to notice under Section 3 First (j). Petitioners' view that it is unnecessary to give notice to this incumbent because he is a member of the Clerks (Br. 35-38) means that

union men such as Shears do not deserve the procedural safeguards to which non-union men are entitled.

Similarly, Shears' union, the Clerks, should receive notice, for it contends that the work in question is covered by a contract between the carrier and the Clerks (R. 38), and it contends that Shears is properly working under that contract. Therefore, the Clerks are vitally interested in this work being available to their members. Since the Clerks have rights under their contract which might be affected by the award herein, they are "involved" and should receive notice.

It seems disingenuous for petitioners to contend (Br. 27-35) that the Clerks have no interest and are not involved in this dispute. This contention entirely disregards the Clerks' letter to the carrier stating that if the Telegraphers win the instant claim, the Clerks will prosecute a claim to the same work (R. 30-31, 38). In addition, the Clerks are so interested in this dispute that they have seen fit to join in the brief of amici curiae herein.

The carrier's submission to the Board contended that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces (R. 36-37) and highlights the involvement of the Clerks.

The legislative history of Section 3 First (j) discloses that the Clerks are entitled to due notice. This is shown in the following colloquy between Commissioner Eastman, the principal author of the bill,[4] and Representative Kenney during the 1934 hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess. (at p. 51):

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4. See *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 723, note 16.

"Mr. Kenney. Mr. Eastman, a dispute of considerable importance might arise. Under this bill would all the labor unions, on any matter that might arise, have a right to be heard on the question?

"Commissioner Eastman. You mean before the Adjustment Board?

"Mr. Kenney. Yes. If a company union raised a question before the Board would the standard union also have the right to appear and be heard on the matter?

"Commissioner Eastman. There is a special provision on page 16, paragraph (j):

> "'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.'

"Mr. Kenney. They might not be directly involved, but the principle may affect them. Do you think this provision is broad enough to give the right to the standard union to appear in respect to that right before the Board on questions raised by the company union?

"Commissioner Eastman. Well, I think that that is intended to be quite broad. These questions that come before the Adjustment Board relate to minor matters, to grievances and to interpretations of existing rules, and so on, and it would be my view that that paragraph [Section 3 First (j)] gives the parties the opportunity to be heard in person, if they care to be heard, and by counsel, or by other representatives.

"Mr. Kenney. That is, from the various unions?

"Commissioner Eastman. Yes."

Since both unions and individuals are not given an opportunity to be heard unless the Board sends them formal notice (R. 25-26, 38), the Board was required to give formal notice to the Clerks and the incumbent so that they would have that opportunity to be heard which was contemplated by the language and legislative history of Section 3 First (j). As stated in *New York* v. *New York, N. H. & H.R. Co.*, 344 U. S. 293, 297, "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

It is interesting to observe that the Government refused to represent the Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N.D. Ill., 1953), affirmed, 212 F. 2d 32 (C.A.7, 1954), because the Board's failure to give due notice deprived the employees of "their position without regard to their constitutional rights" (R. 24). The Government informed this Division of the Board (R. 25):

> "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case."

Among the cases cited in the Government's letter to the Board was *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C.A.5, 1937), where the court construed the phrase "employees involved" in Section 3 First (j) as follows (at p. 770):

> "Apparently, the Board held that Lane was not involved in the dispute and therefore was not entitled to notice under the provisions of section 3. In this we think the Board was wrong. * * * But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

In *Townsend* v. *National Railroad Adjustment Board,* 117 F. Supp. 654 (N.D.Ill., 1954), the same phrase was defined as follows (at p. 658):

> "An employee is 'involved' in a dispute within the meaning of Section 3 [First (j)] of the Railroad Labor Act if he will or could be adversely affected by an adjudication of the dispute. Hunter vs. Atchison T. & S. F. Ry. Co., 7 Cir., 1951, 188 F. 2d 294. Indeed, if the term were not so defined, grave constitutional questions would be presented, for trainmen might be deprived of property—e.g., the right to do a particular kind of work —as the result of hearings in which they did not participate." (See also *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 734, note 31.)

The word "involved" in Section 3 First (j) was construed as follows in a recent award (Third Division Award 6482, at p. 25):

> "The word *involved,* which has been said to be ambiguous, is derived from the Latin 'involvere' meaning

to roll about or wrap up. One of the current definitions of the verb form is 'draw into a complication; implicate,' and another 'to roll up in itself so as to gather in, embrace or comprehend; include.'

"Thus we are of the opinion that as the word appears in Section 3, First (j) of the Act, it refers to employes who are implicated, or included in the matter under submission. It applies to persons substantially affected or to be affected by an order of this Board."

After giving due notice to the incumbent and his union, the Board could consider in one proceeding both the Telegraphers' and Clerks' contracts in the light of each other and in the light of custom, practice and usage under those contracts, in order to determine whether both contracts or only one of them apply to the Palestine, Illinois, work in question. It must be remembered that Section 3 First (i) of the Railway Labor Act gives the National Railroad Adjustment Board authority to interpret and apply bargaining agreements. Consequently, this is the very type of controversy which the National Railroad Adjustment Board was established to resolve. Thus the Board has held that it has jurisdiction to interpret and apply contracts between a carrier and two unions. For example, in Award 5432, the Third Division (which is the one herein) stated (at p. 25):

"Where the carrier has contracted with one or both parties to a dispute, no jurisdictional question is involved. It is then a matter of contract interpretation for this Board."

See to the same effect, Third Division Awards 4471, 4951 and 5410. These awards accord with the decisions in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks.*

188 F. 2d 302 (C.A.7, 1951); *Brennan* v. *Delaware, L. & W. R. Co.*, 303 N.Y. 411, 103 N. E. 2d 542 (1952), certiorari denied, 343 U. S. 977; and *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654, 659 (N.D.Ill., 1954); see *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 205. An Emergency Board has also observed that the National Railroad Adjustment Board was "designed to adjudicate such controversies." (See p. 13. of July 24, 1945, Report of Emergency Board appointed to investigate certain disputes between the Illinois Central Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Locomotive Engineers.)

One of the exhibits in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, shows too that the National Railroad Adjustment Board rather than the National Mediation Board has jurisdiction over such disputes concerning the interpretation and application of different labor contracts. Thus Exhibit P-12 (see *Pitney* R. 17-18), which is a telegram from the Secretary of the National Mediation Board to the President of the Order of Railway Conductors, declares:

> "After due consideration [National Mediation] Board finds you base your claims on provisions of existing agreement. Board has never considered Section 5 of Railway Labor Act [45 U.S.C. 155] as covering alleged violation of agreements or claims to service based on previously existing rights, such matters being covered by Section 3, First (i) of the Act [dealing with the National Railroad Adjustment Board]. The National Mediation Board therefore directs me to advise you it has no jurisdiction over the dispute in its present status."

Furthermore, the National Mediation Board does not agree that mediation is the proper solution of controversies such as this, because mediation is only between the union whose

strike threat has brought on mediation and the carrier, and would not include the union performing the work (p. 34 of the 17th Annual Report of the National Mediation Board for 1951).

This case is simply an attempt by the Telegraphers and Clerks to apply certain union contracts to specific work. It falls within the Board's statutory function concerning the "interpretation or application" of collective bargaining agreements (Section 3 First (i)) and that function is to be done as a whole, and not by halves as petitioners desire. Particularly is this true because each half would then be decided by a different referee. The Board is of course required to decide claims on the basis of all the facts and all the applicable contracts.

As stated in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 305-306 (C.A.7, 1951):

> "The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. However, we are convinced from our examination of the Act that it does not require such construction.
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> "Obviously it is desirable to settle controversies such as these involving so-called 'over-lapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by §6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought

> before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. And we think the case, Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, supports this view. That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.' "

This is not a case of deciding which union has the right to contract, as the amici imply (Br. 15). It is a case of interpreting two contracts to determine whether one or both cover the same work. Since the *Pitney*, *Slocum*, *Missouri-Kansas-Texas* and *Brennan* cases, as well as various Awards, have decided that the Board does have jurisdiction to interpret both contracts, it follows, as the amici curiae admit in such circumstances (Br. 15), that the incumbent and the Clerks are clearly "entitled to notice and an opportunity to be heard in opposition to the Telegraphers' claim."

Throughout their brief, petitioners erroneously assert that this lawsuit is an attempt of the carrier to have the Board rewrite existing contracts with the Telegraphers and Clerks. Nothing could be further from the truth. The Carrier Members merely seek to be able to interpret and apply the two contracts in the light of each other and of

custom, practice and usage. It is for the Board to decide which contract applies, or whether they overlap. In considering the Telegraphers' and Clerks' agreements in one proceeding, the Board could hold, if it is a fact, that the contracts overlap. The carrier would then have to seek such other remedy as might be available to it. Giving all persons an opportunity to participate in one proceeding would prevent the second dispute threatened by the Clerks (R. 28). As the Telegraphers' own representative has said at another time:

> "I am certain that Mr. Douglas, the referee, or any member of the Board, cannot and will not say that Congress, in enacting the Labor Act, intended to create another dispute through the National Railroad Adjustment Board in disposing of one and that is what Awards 3932, 3933, and 3934 actually accomplish. The referee gets entirely away from the facts when he states that the third party is 'indirectly' affected, when as a matter of fact, The Order of Railroad Telegraphers, as well as the carrier, is 'directly' affected, as it takes the work and the positions away from The Order of Railroad Telegraphers and gives them to the Brotherhood of Railway and Steamship Clerks without examining the facts in the case as to the contractual relations between the ORT and the carrier." (See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board* 26 Labor Cases ¶68,671 (N.D. Ill., 1954), p. 87,271.)

In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, the railroad's complaint (par. 30; *Slocum* R. 13) stated that it could not get the two claims of the Clerks and Telegraphers before the Board and have them settled so that both organizations would be bound. The Telegraphers' denial (*Slocum* R. 19) necessarily admitted that the Board does have binding power to interpret both contracts together, as requested by the instant respondents.

The Telegraphers stated in their *Slocum* brief that cases such as these do not involve the Board's consideration of generally phrased collective bargaining agreements alone, but also the custom, practice and usage thereunder (at pp. 7, 25, 27). That is why the Clerks and Telegraphers should be before the Board and a single referee in one proceeding to prove the custom, practice and usage claimed by each. The Telegraphers in the *Slocum* case also relied (Br. 25) on the same language from *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, as the court of appeals relied on in this case (R. 56). That said language was intentionally used by this Court is suggested by the fact that the petition for rehearing in the *Pitney* case specifically took issue with and argued against that language (at pp. 2-6). This Court denied the petition.

As in *Missouri-Kansas-Texas R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954), if the respective claims of the Telegraphers and Clerks are to be presented to the Board in different proceedings, this simply means that one referee will decide the Telegraphers' claim and another referee the Clerks' claim and at no time will a single referee have the benefit of the position of the incumbent, the Telegraphers, Clerks and carrier.

It is elementary that notice and hearing are necessary attributes of due process. *In re Oliver*, 333 U. S. 257, 273; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 187; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124. This complaint was filed so that the proceeding before the Board will comply with rudimentary notions of due process. Unless the Board gives notice to Shears and the Clerks, their constitutional and statutory rights will be violated.

The petitioners have urged this Court to pass on the due notice issue (Pet. 14). When this Court holds that due notice must be given to the incumbent and his union, then and only then will the Board comply with the notice provisions of Section 3 First (j). Unless the decision below is affirmed, in this type of case the Board will still refuse to accord hearings to individual employees or their union even though their status might be affected by the Board, and even though the Carrier Members vote to give notice. See *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 205; *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 798, note 15 (C. A. 3, 1951); "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303, 314 (1951).

The court below was unable to understand why the Board failed to give notice, stating (R. 55-56):

> "It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute."

The Telegraphers themselves sought to participate in the Clerks' claims involved in the *Missouri-Kansas-Texas* case.[5] In their petition for certiorari (at pp. 3-4, 7-8) in this Court in *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 329 U. S. 758, they also claimed that the Railway Labor Act required that they and the incumbents be given due notice and an opportunity to participate. Therefore, it seems ironic for them now to assert that the

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5. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), finding 66, p. 87,262; see also Third Division Award 2597.

Clerks are not entitled to notice and to participate in this Telegraphers' case. The change in position is because a *rapprochement* has taken place between the two unions, so that each may obtain a favorable award against a carrier without notice being given to the other. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954), findings 59-64, pp. 87,261-87,262, finding 158, p. 87,276; see also p. 87,285. (None of the findings in the *Missouri-Kansas-Texas* case was challenged by the petitioners, who were also parties therein.) In that way, a carrier is faced with two conflicting awards, each made by a different referee without benefit of the arguments made in the other claim, and each of which is "entitled to presumptive weight" by the courts (*Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 664).

For years the Telegraphers persisted in contending that the Board must give them and incumbents notice and an opportunity to be heard when another union was claiming work being performed by Telegraphers. But in 1942, H. C. Kearby, a vice president of the Telegraphers and a member of the Board, voted against the Clerks' claims in a series of six awards. As a result the Clerks and Railway Labor Executives' Association had Mr. Kearby removed from the Board. (After his removal, the Clerks filed similar claims and a referee decided them in their favor.) The Telegraphers thereafter acceded to the Clerks' and Railway Labor Executives' Association's policy on notice in order to secure Board representation again, which was finally accomplished in 1949. See *Missouri- Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N.D. Ill., 1954), findings 60-64, pp. 87,261-87,262; Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis," 5 Industrial and Labor Relations Review 365, 381 (1952).

In an effort to avoid the notice requirement of Section 3 First (j), petitioners urge that an incumbent might be entitled to notice if he does not have a contract with the carrier, on the alleged ground that an Adjustment Board proceeding and a statutory judicial enforcement suit "are not available in such a situation" (Br. 32). This completely ignores the fact that the Board also has jurisdiction over grievances, and not just over the interpretation and application of contracts. Likewise, enforcement suits are available with respect to awards settling grievances. (See Sections 3 First (i) and (p) of the Railway Labor Act.)

Of course, where the third-party incumbent has a contract, he is "involved" within the meaning of Section 3 First (j), for if the claimant prevails and obtains an award sustaining his interpretation of his contract, the incumbent loses his job.

If the Clerks did not have a contract with the carrier, surely the petitioners would still argue that the Clerks were not entitled to notice, on the ground that there was no contract between them and the railroad. Thus in *Hunter v. Atchison, T. & Santa Fe Ry. Co.*, 171 F. 2d 594 (C.A. 7, 1948), certiorari denied, 337 U. S. 916, the brakemen unsuccessfully argued (at p. 597) that the porters were not entitled to notice under Section 3 First (j) because they had no contract with the railroad.

The petitioners allege that the Board has no way of knowing whether the sustaining of the Telegraphers' claims would result in displacement of the incumbent (Br. 35-36). However, the Board does not sit in an ivory tower. Its experience with past awards teaches that whenever claimants obtain sustaining awards, the work in question is normally transferred to members of the claiming union, and the incumbent members of the rival union are dis-

placed. See, for example, *Missouri-Kansas-Texas Railroad* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 304 (C.A. 7, 1951). If the award in the instant case should decide the claim in favor of the Telegraphers, it is anticipated that the incumbent and the Clerks would lose out, for the Telegraphers would exert persuasion and economic power to cause compliance with the award. It is plain that carriers will not simultaneously employ two persons where one had been employed satisfactorily. The Telegraphers certainly know that, for the survey which they make before filing a claim would show the nature of the work, who is doing it, and how much of his time is devoted to it.

The petitioners argue that the incumbent is not injured but instead only persons at the bottom of the seniority roster are likely to be damaged (Br. 36). That argument does not recognize that an incumbent would normally be satisfied with his present job and not be desirous of dropping down one step. Such a demotion would obviously render him an aggrieved or "involved" person. Furthermore, courts are familiar with the problems which arise in drawing a line between those whose interest is sufficiently direct to be given judicial recognition and those who must rely on others to enforce their interests. Thus it has been held that the present incumbent is the one who is entitled to notice rather than those of less seniority than he. *Brotherhood of Railway and Steamship Clerks* v. *Pennsylvania R. Co.*, 107 F. Supp. 924 (W.D. Pa., 1952); cf. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 800 (C. A. 3, 1951).

Petitioners also state that lack of notice to the incumbent was never raised before the Board (Br. 36-37). However, the record shows that a Carrier Member raised the lack of

notice "to the employes involved," whom he defined as "The Brotherhood of Railway Clerks, or the constituents thereof" (R. 18), thereby, of course, including member Shears, and there is an unchallenged finding that the Carrier Member objected "upon ascertaining that no notice had been given to the Clerks or to members of the craft represented by the Clerks" (R. 37).

With respect to notice to an incumbent, the petitioners claim that the Board will not be able to ascertain his name (Br. 36). But the carrier can of course easily supply the incumbent's name, and the claimant union would also have this information from its survey preparatory to filing its submission, so that this asserted difficulty is actually nonexistent.

This case involves contracts of the Telegraphers and Clerks, and the Third Division has jurisdiction under Section 3 First (h) over "telegraph employees" and "clerical employees." Consequently, there is no question here of giving notice to employees subject to another Division (cf. petitioners' Br. 33-34), and such cases seldom arise. In any event, the jurisdiction of the various Divisions of the Board is now grounded "on a craft or job classification irrespective of the labor organization representing the particular employees involved" (*Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 528). Therefore, if a Division has jurisdiction over the claimant craft or job classification, it should give notice to third persons (see Third Division Award 1400), and the ensuing hearing will enable the Division to determine what relief should be accorded. It is immaterial that one of the unions may not have a member on the Division, for the number of Labor Members on the entire Board was fixed "without any thought that it would give all the different organizations a representative" (Hearings on H.R. 7650 before the House Committee on

Interstate and Foreign Commerce, 73d Cong. 2d Sess., p. 93).

Under Section 3 First (m) of the Railway Labor Act, awards are to be "final and binding." Since the Act contemplates valid awards settling the matters in issue, the Board should not be permitted to render a void award, which will simply engender further controversy, including threats and strikes (see *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶68,671 (N.D. Ill. 1954), finding 127, at p. 87,272). This action was filed so that the Board will proceed to render a valid award, as contemplated by Congress. The Board should not be permitted to continue flying in the teeth of its known duty, resulting in deserved criticism and disrespect. See "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303 (1951). It is in the public interest to avoid periods of potential conflict when a carrier, employee, and his union may not know what the employee's status is. Therefore, the Board should adjudicate Shears' status at the same time that it is considering the Telegraphers' claim to his work. But unless the Board gives Shears and the Clerks notice and an opportunity to participate, it will, as always, refuse to consider together the Telegraphers' and Clerks' contracts as intended by the *Pitney* and other decisions.

The brief of the amici curiae insists that if the decision below is affirmed, the National Railroad Adjustment Board will be by-passed (Br. 21; see also petitioners' Br. 35). The short answer to this rather hysterical claim is that claims are being regularly docketed and processed by the Board. Of the cases before the Board, only a small percentage involve the issue of due notice to third persons. Since there are few cases of this nature, the statement of the amici curiae that this Board would not be utilized if the decision below is affirmed is highly exaggerated and without any foundation in fact.

II. FORMAL NOTICE IS NECESSARY BECAUSE ACTUAL NOTICE TO THE IMCUMBENT AND HIS UNION WOULD NOT ENTITLE THEM TO PARTICIPATE IN THE PROCEEDINGS BEFORE THE BOARD.

Petitioners contend (Br. 38-41) that if the incumbent and his union had actual notice, that would suffice. In the first place, it is not shown that the incumbent had actual notice (R. 37). Moreover, the facts in this record, as well as in many other cases, have established that the Board will permit only those who have received formal notice to participate in proceedings before it (R. 25-26, 38). Consequently, actual knowledge of the proceedings would not suffice, for due process requires not only notice but an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123, 124; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 178; *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 297.

In order that the employees involved would be permitted to participate before the Board, the actual notice test was found insufficient in this case (R. 55) and in *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7, 1954), and formal notice was required because of the actual practice of the Board. The court explained the reason for this change in the *Allain* case (212 F. 2d at pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second Hunter case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We

> hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity, and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him.'
>
> "Although we indicated in that opinion that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."[6]

As shown, actual notice of the proceedings would not permit the incumbent and his union to participate in the hearing of this docket. Yet Section 3 First (j) of the Railway Labor Act requires the Board to give "due notice of hearings," obviously so that the employees involved might be allowed to participate in those hearings.

Elgin, J. & E. R. Co. v. *Burley*, 325 U. S. 711, contemplates that an affected employee must be permitted to participate in the proceedings before the Board, for the Court said (at p. 736):

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6. See also *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654, 657 (N.D. Ill., 1954); *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453, 459, 460 (N. D. Ill., 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954).

> "His [the employee's] *rights*, to share in the negotiations, *to be heard before the Board*, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier could foreclose his claim altogether at the threshold of the statutory procedure." (Italics supplied.)

The Court further noted that when a dispute has been submitted to the Board, the affected employee "has *rights of* notice, *hearing* and individual representation according to his choice" (at p. 746; italics supplied). This opinion was subsequently adhered to in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 662, 666.

To support their argument that actual notice is sufficient, petitioners cite (Br. 38) *Estes* v. *Union Terminal*, 89 F. 2d 768 (C. A. 5, 1937); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294 (C. A. 7, 1951), certiorari denied, 342 U. S. 819; and *Kirby* v. *Pennsylvania R. Co.* 188 F. 2d 793 (C. A. 3, 1951). Those cases were decided before it was established that the Board will only hear persons who have received formal notice from it (R. 25-26, 38). But even in those cases the courts recognized that actual knowledge would not suffice unless the employees involved were given an opportunity to be heard before the Board. Thus in the *Estes* case, after showing that employee Lane had actual knowledge, the court stated (89 F. 2d at pp. 770, 771):

> "No man should be deprived of his means of livelihood *without a fair opportunity to defend himself*. Plainly that is the intent of the [Railway Labor] law.
>
> • • • • •
>
> "He had the *right* to intervene in the proceedings before the Board." (Emphasis supplied.)

Even in the *Hunter* case (which has been superseded as to

actual knowledge by this case and the *Allain* case; see *supra*, p. 33) the court said (188 F. 2d at p. 301):

> "*Actual notice* of the hearings for a sufficient period prior thereto *to permit plaintiffs* to be present and *to be heard* is all that is required.
>
> • • • • •
>
> "The statute requires the Adjustment Board to give due notice of all *hearings* to the employees involved in the dispute before it, and not merely notice of the fact that proceedings may be pending before the Board." (Emphasis supplied.)

Finally, in the *Kirby* case, the court stated (188 F. 2d at p. 798) that employees involved "are entitled to notice and an *opportunity to be heard before the Adjustment Board.*" (Italics supplied.)

Unless the incumbent and the Clerks are given formal notice and an opportunity to be heard, they would not be bound by an award herein. Actual knowledge would not bind them, for persons with actual knowledge would not be permitted to participate before the Board (cf. petitioners' Brief 8). In *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 297, the City of New York had actual knowledge but was not held to be bound thereby.

In order to enforce the Railway Labor Act, the instant injunction stays the proceedings of the Board until (1) it gives "formal notice" to the employees involved and (2) permits them "to participate in the proceedings" before the Board (R. 41). The injunction was two-pronged because due process requires not only notice but also an opportunity to be heard.

III. JUDICIAL RELIEF IS NECESSARY.

Petitioners have argued at length that it was improper for the district court to grant any relief (Br. 9-27). How-

ever, the circumstances of this case certainly necessitate relief in the nature of mandamus. The Carrier Members of the Board welcome the assistance of the Court so that the Board will perform its statutory duty to give notice.

A. The Preliminary Injunction Was Warranted Because the Board Had Already Determined Not to Give the Statutory Notice.

The Board was requested to give the notice required by the Railway Labor Act, but by a 5-5 vote it denied the request (R. 20, 46). The Board had already made the wrong decision. Cf. *Pope* v. *United States*, 323 U. S. 1, 14, and *Burnet* v. *Desmornes y Alvarez*, 226 U. S. 145, 147, on which petitioners rely (Br. 21). Even if the referee had subsequently voted that notice be given, no notice would have issued, for the practice of the Board is not to give notice unless the Board is unanimous (Appendix, *infra*, p. 68).

Since the Board had already refused to perform its statutory duty (R. 46, 20), it became appropriate for the district court to accord the relief which the Board would not give. Cf. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124; *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165, 167 (S. D. N. Y., 1924). The district court was merely endeavoring to enforce the command of Section 3 First (j) in the face of the Board's refusal to act. The Board has already been given "the first opportunity to pass on the issue" (*Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567) and has denied relief, so that there was no reason for the district court to stay its hand. Equitable relief is needed, for "the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * *' created to protect the interest of individuals or the public is clearly shown" (*ibid.* at p. 566).

Here then there was an exhaustion of the administrative remedy on notice, so that judicial intervention was warranted. Cf. *Gibson* v. *United States*, 329 U. S. 338, 350; *Lovell* v. *Griffin*, 303 U. S. 444, 452-453. But in any event, it was unnecessary for the carrier to proceed further before the Board, for the failure to give notice made the Board powerless to proceed (R. 53). Cf. *Montana Bank* v. *Yellowstone County*, 276 U. S. 499, 505. As held in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799 (C. A. 3, 1951):

> "The Board's authority to act is based upon the statute. Until the statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens."

See also *Allain* v. *Tummon*, 212 F. 2d. 32, 36 (C. A. 7, 1954).

The rule as to exhausting administrative remedies is not an absolute but is rather a rule of judicial administration. *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 282; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 156-157; *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 468. As stated in McAllister, "Review of Federal Administrative Orders," 28 Cal. L. Rev. 129, 164 (1940):

> "The substance of the inquiry that should be made is whether the administrative action in question, no matter what form it may take or at what stage of some proceeding it is taken, is important and final enough so that some door should be open to subject it to judicial examination."

Here the Board's decision not to give notice was sufficiently "important and final" to warrant rectification by the courts.

Thus in *Waite* v. *Macy*, 246 U. S. 606, the federal Tea Board had not yet decided the case against the plaintiff tea

importers, but the Court granted them relief. Mr. Justice Holmes stated (at pp. 608-609):

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill* v. *Jones*, 106 U. S. 466. *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215. *United States* v. *George*, 228 U. S. 14, 21. Again, it is true that courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain."

Similarly here, it is already known that the Board will not give due notice (see p. 37, *supra*), so that the district court was justified in granting the preliminary injunction. "The Secretary and the board must keep within the statute * * * which goes to their jurisdiction * * *" (246 U. S. at p. 610).

As shown, the Board has already decided not to issue the notice specified in Section 3 First (j) of the Railway Labor Act and the respondents are unable to compel the Board to perform its statutory duty without the aid of a court. The Board proposes to adjudicate the claim without complying

with the statutory notice and hearing requirements (R. 37). In these circumstances, petitioners' "objection to judicial restraint of an unauthorized exercise of powers is not weighty." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 157.

B. Since the Board Has Exceeded Its Statutory Authority, the Rule Requiring Exhaustion of Administrative Remedies Is Inapplicable.

In Part III A, *supra*, the respondents have shown that the Board has already ruled adversely on the notice question, and that no further administrative relief is available to secure notice. Even if administrative remedies were available, the rule requiring exhaustion of administrative remedies is inapplicable, since the Board has exceeded its statutory authority.[7]

The respondent Carrier Members of course recognize the rule that ordinarily judicial intervention is not warranted where plaintiffs have not exhausted their administrative remedies. However, that rule does not apply where, as here, the administrative body has failed to comply with the governing statute and has, therefore, acted without statutory authority.[8] Stated differently, the rule does not apply

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7. The authorities are collected in Judge Frank's dissent in *Lichten* v. *Eastern Airlines*, 189 F. 2d 939, 945-948 (C. A. 2, 1951). The majority opinion in the *Lichten* case also acknowledged that the exhaustion rule does not apply where an administrative agency transcends its powers (at p. 941).

8. *Work* v. *Louisiana*, 269 U. S. 250, 254; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187-188; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562-563; *Waite* v. *Macy*, 246 U. S. 606, 610; *Dragna* v. *Landon*, 209 F. 2d 26, 28 (C. A. 9, 1953); *Chambers* v. *Robertson*, 183 F. 2d 144, 146 (C. A. D. C., 1950), reversed on other grounds, 341 U. S. 37; *United States* ex rel. *De Lucia* v. *O'Donovan*, 178 F. 2d 876, 879-880 (C. A. 7, 1950), certiorari denied, 340 U. S. 886; *Wettre* v. *Hague*, 168 F. 2d 825, 826-827 (C. A. 1, 1948); cf. *U. S. Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 204.

where the defect urged goes to the jurisdiction of the administrative agency[9]

Thus in *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, an administrative agency was compelled to act in compliance with the basic statute, even though the administrative action was still in an initial stage where, as here, the administrative departure from the statute was clear.

In the *Kansas City Southern* case, the pertinent statute required the Interstate Commerce Commission to ascertain the value of railroad property in a prescribed way. In the midst of its hearing, the Commission refused to receive testimony proffered by the railway under that statute, and the railway thereupon brought a mandamus proceeding.

In upholding judicial intervention, the Court noted that the controversy was "one solely involving an alleged refusal to discharge duties which the statute exacts" (252 U. S. at p. 187). Similarly here, the Board has refused to discharge its statutory duty of giving due notice of the hearings to D. A. Shears and his union.

In ordering the Commission to perform its statutory duty, the Court stated (252 U. S. at p. 187):

> "Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready

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9. *Waite* v. *Macy*, 246 U. S. 606, 608, 610; *Gonzales* v. *Williams*, 192 U. S. 1, 15; *Ogden City* v. *Armstrong*, 168 U. S. 224, 239; *Varney* v. *Warehime*, 147 F. 2d 238, 243 (C. A. 6, 1945), certiorari denied, 325 U. S. 882; cf. *De Beers Consolidated Mines* v. *United States*, 325 U. S. 212; *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456; *Brown Lumber Co.* v. *Louisville & Nashville R. Co.*, 299 U. S. 393, 398-399; *Reynolds* v. *United States*, 292 U. S. 443, 446; *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 147-148 (C. A. 5, 1936), certiorari denied, 298 U. S. 688.

> solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command."

The Court concluded by stating that the Commission had "no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise" (at p. 188). Here the Board is exerting its general power under the Railway Labor Act while disregarding the essential due notice conditions imposed by Congress in Section 3 First (j) of the Act. Accordingly, as in the *Kansas City Southern* case, the Board should be directed to perform its statutory duty, *viz.*, to give due notice of all hearings to D. A. Shears and the Clerks in compliance with Section 3 First (j) of the Act.

In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, the defendants contended that the district court did not have jurisdiction to grant relief from an I.C.C. rate increase because the plaintiff had not exhausted its remedies before the Commission. In holding that the district court properly assumed jurisdiction, Mr. Justice Brandeis stated (at pp. 562-563):

> "But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49;

Louisiana & Pacific Ry Co. v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. *The Sacramento Case, supra*, was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433. The district court properly assumed jurisdiction of this suit."

The rule requiring exhaustion of administrative remedies would seem especially inapplicable where, as here, the administrative agency has not only ignored the statutory command but has ignored constitutional rights to notice and hearing. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 178; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C.A. D.C., 1953), certiorari denied, 347 U. S. 943. No question requiring administrative expertness is involved, but a decision by this Court is required to establish uniformity in the Board as to notice. Cf. *Lichten* v. *Eastern Airlines*, 189 F. 2d 939, 946 (C.A.2, 1951) (dissent). At present, there is a hopeless morass of conflicting awards on the due notice issue. For example, the following awards observe the provisions of Section 3 First (j) and favor the giving of notice to involved persons other than the claimant and carrier: Third Division Awards 1193, 1400, 3368, 5432, 5599, 5627, 5751, 5759, 6051, 6227, 6390 and 6683. However, the following awards are contra: Third Division Awards 844, 902, 1137, 1309, 2253, 2548, 3932, 5702, 5865, 5993, 6115 and 6203.

Since there was a lack of unanimity in the Board, notice issued in none of the above cases (see Appendix, *infra* p. 68).

The failure to give notice was not the basis for Award 6224 (cf. petitioners' Br. 14).

Two of the awards relied upon in the brief of the amici curiae (Br. 11-12) do not even concern the question of notice under Section 3 First (j); the remaining award (Br. 10-11) is believed to be erroneous.

Since notice never is issued unless the Board is unanimous (see Appendix, *infra*, p. 68), claims are held in abeyance or dismissed without prejudice when awards decide that due notice should be given. The claims dismissed without prejudice are then re-filed[10] in the hope that the notice issue will be decided differently. Thus this stalemate on notice has increased the number of unresolved claims and is the kind of "jurisdictional frustration on an administrative level" (*Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524) appropriate for resolution by the courts. The Carrier Members insist that the Board needs judicial guidance to end the unceasing conflict in the Board on notice and permit cases involving that issue to be decided properly.

Unlike the cases relied on by petitioners (Br. 10-13), the carrier in this case is not trying to by-pass the Board but instead is trying to have the Board issue notice so that it may render a valid award. In view of the Board's flagrant disregard of the notice requirements of Section 3 First (j), "this Court should no longer require exhaustion of * * * ineffective and inadequate remedies before permitting resort to the federal district courts * * *." *Marino* v. *Ragen*, 332 U. S. 561, 570 (concurring opinion); cf. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 468-469.

The cases on which petitioners rely (Br. 10-13) are not in

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10. See, *e.g.*, *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 304 (C. A. 7, 1951).

point, for the plaintiffs in those cases were seeking to avoid administrative hearings, while here the carrier wants the Board to decide this claim after notice is given. Perhaps petitioners' main reliance is on *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, but there the company attempted to short-cut and by-pass the review procedure outlined in the Act for renegotiation of war contracts. The company there did not want to deal with the Tax Court. Here the carrier is not only not trying to avoid going to the Board but also is actually trying to have its case decided validly by the Board. The whole point of this action is to put the case properly before the Board, not to take it away from the Board. Furthermore, the Tax Court's actions in the *Aircraft & Diesel* case were blameless. Here the trouble arises because the Board is deliberately ignoring its known duty; it has chosen to contradict the statute and all the decisions interpreting it. In this case, it has already refused to give notice (see p. 37, *supra*). The letter from the Department of Justice to the Board refusing to represent the Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N.D.Ill. 1953), affirmed, 212 F. 2d 32 (C.A. 7, 1954), reveals the extent to which the Board has disobeyed the notice requirement of Section 3 First (j) (R. 23-25). Even the *Aircraft & Diesel* case acknowledges that the exhaustion rule is not inflexible (331 U. S. at p. 773).

In the *Aircraft & Diesel* case, the Court quoted (331 U. S. at p. 774) the following excerpt from *Yakus* v. *United States*, 321 U. S. 414, 435:

> "Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed."

Here the Board has already refused to give due notice and, therefore, has shown that it is incapable of affording due process. The Board has continued to reject all the decisions requiring it to give due notice in the circumstances here presented.

Petitioners also rely (Br. 13, 15) on *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, but there the Court stated (at pp. 540-541):

> "It is appellee's principal claim that there is no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no right to do so. We, therefore, go directly to the heart of this controversy, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized."

In the instant case also, it is respondents' claim that there is no properly authorized administrative procedure and that the Board has no right to determine the claim—until due notice is given. Therefore, as in the *Grand Central Aircraft* case, it is appropriate to "go directly to the heart of this controversy, which is the question whether" notice must be given to the incumbent and his union pursuant to Section 3 First (j) of the Act. The respondents did not ask the courts below, nor are they asking this Court to decide the claim pending before the Board. The due notice question is the only one presented for adjudication. The question of interpreting the notice requirements of Section 3 First (j) does not require any expert administrative experience, but instead is the kind of question typically decided by courts.

The exhaustion cases on which the petitioners rely do not involve notice and are cases in which the administrative agencies were just embarking. In the instant case, years of experience of abuses under Section 3 First (j) have taught the respondents that they have no chance of

persuading the Board to give due notice. Patience and remedies have been exhausted over the years. Thus, although the Eighth Circuit first held in the *New Orleans, Texas & Mexico Railway* case that it would not grant the relief sought, the passage of time convinced the court that the Board would not reform if left to its own devices and, accordingly, the *Templeton* case overruled the *New Orleans, Texas & Mexico Railway* case (see p. 14, *supra*).

The petitioners have attempted to challenge a dictum of the court below that the Railway Labor Act does not give a referee authority to decide the question of notice (Br. 21-24). However, petitioners have no standing to argue this point, for it is not contained in the questions presented in the petition for certiorari (Pet. 2-4). *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179. Nor is the point discussed in Judge Swaim's dissent (R. 57-60).

It is unnecessary for this Court to determine whether or not a referee may pass on the due notice question because this Court's interpretation of Section 3 First (j) will constitute an authoritative precedent for the future guidance of the Board and will prevent deadlocks on the question of due notice. Even if the referee herein had voted in favor of due notice, the Board would not have issued due notice because of the lack of unanimity on the question (see Appendix, *infra*, p. 68) .

This referee was appointed to decide the Board's deadlock on the merits (R. 46) and "there is no provision for the appointment of referees to resolve procedural deadlocks" (see "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303, 311, note 57 (1951); Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis," 5 Industrial and Labor Relations Rev. 365, 368, 372 (1952); *Kirby* v.

Pennsylvania R. Co., 188 F. 2d 793, 798, note 15 (C.A.3, 1951)). In *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, it was assumed that a referee's power extends only to breaking deadlocks on the merits. It might be noted that the Mediation Board's almost invariable practice has been, as here, to appoint referees to resolve deadlocks on the merits rather than to resolve deadlocks on due notice. Indeed, that was true of all the Awards on which petitioners rely (Br. 22).

Regardless of whether certain referees have passed on the question of due notice, this record establishes that it is the present practice of the Third Division "to consider matters of procedure in executive session at which only the regular 10 members and the Secretary of this Division are permitted to be present and at which only the regular 10 members are permitted to vote" (R. 26; see also R. 20). Moreover, the district court found that "In accordance with the custom and practice of the Third Division, Referee McMahon was excluded from the consideration and vote on the [due notice] objection" (R. 37), and this finding was not challenged by petitioners.

The record thus establishes that the entire Third Division did not consider that the referee had power to decide the due notice question, so that, as far as the Board is concerned, his authority is not really an issue in the case (R. 20).

It is incorrect to assert, as petitioners do (Br. 23), that when referees have passed on the due notice question, disputes have been successfully resolved. Instead, the truth of the matter is that where the referees have favored notice, claims are held in abeyance or dismissed without prejudice, instead of being decided on the merits. Where referees have decided that it was unnecessary to give notice, the disputes have not been resolved either, for the ensuing void awards have bred litigation. For example, in *Missouri-*

Kansas-Texas Railroad Co. v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), the Board's failure to give notice has already resulted in 11 years' delay in obtaining settlement of the disputes there involved, caused by the Labor Members' and collective bargaining representatives' refusal to comply with Section 3 First (j) of the Railway Labor Act. For the same reasons, similar controversies on the New Orleans, Texas & Mexico and Santa Fe railroads have remained unsettled since 1937 and 1939, respectively. See *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 26 Labor Cases ¶ 68,622 (E.D. Mo., 1954); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294, 296 (C.A. 7, 1951), certiorari denied, 342 U. S. 819; *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527, 530 (C.A. 8, 1950), certiorari denied, 340 U. S. 823; *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954).

The petitioners claim that subsequent to the decision below the National Mediation Board has not been appointing referees where the Board is deadlocked on due notice and that accordingly there is an administrative paralysis (Br. 23). Actually, however, to avoid all possible administrative paralysis, claims are being dismissed for want of notice when that question is presented. See Third Division Awards 6482, 6483, 6484, 6485, 6680, 6681, 6682, 6683, 6799, 6812, and 6813. The Carrier Members of the Board know of no case being held up on the Board's calendar as a result of the opinion below.

C. An Enforcement Suit under Section 3 First (p) of the Railway Labor Act Is Neither an Exclusive nor Adequate Remedy.

Although petitioners claim (Br. 16-21) that when the Board fails to give due notice the only remedy available to the carrier is to defend an enforcement suit if one is filed

within two years after an award is issued (Section 3 First (p)), neither decision relied upon (Br. 19-20) so holds.

In *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (C.A.D.C., 1941), affirmed by an equally divided Court, 319 U. S. 732, it was held that a carrier may not have an adverse award of the Board reviewed on the merits, at least until after the expiration of the two-year period contained in the enforcement suit provision (Section 3 First (q)) (see 124 F. 2d at pp. 238, 251). Justice Rutledge expressly limited the *Washington Terminal* decision to the facts and issues there presented (124 F. 2d at p. 252). The plaintiff there attempted to have the court substitute its judgment for that of the Board. There is no such attempt here.

Similarly, in *New Orleans Public Belt Railroad Commission* v. *Ward*, 182 F. 2d 654 (C.A. 5, 1950), the Board had rendered an award against a carrier, which thereupon sought a judicial review on the merits. Neither that case nor the *Washington Terminal* case involved due notice, and here the carrier has not asked for judicial review of an award.

Unlike the *Washington Terminal Co.* and *New Orleans Public Belt Railroad Commission* cases, which hold that a court should not adjudicate the merits of a National Railroad Adjustment Board case, this complaint was filed so that the Board will give the requisite notice and then proceed to render an award on the merits. The injunctive relief sought in this case is to enforce the Railway Labor Act rather than to oppose it. Arguments as to the exclusiveness of the enforcement suit remedy have been rejected in all cases involving the failure to give notice under Section 3 First (j). See, *e.g.*, *Allain* v. *Tummon*, 212 F. 2d 32, 35 (C.A. 7, 1954) and cases cited; *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823.

The whole point of this lawsuit is to secure the serving of notice. Defending an enforcement suit would not result in the serving of notice. In an enforcement suit, the failure to give due notice would merely result in the voiding of the award, and the basic controversy would remain undetermined after a great expenditure of time, money and effort. It would still be necessary to file another action like the present one in order for due notice to be given. If the carrier should thereafter lose on the merits before the Board, damages would be claimed throughout the extra period of delay caused by the initial failure to give notice.

In addition, if the Telegraphers should file an enforcement suit, the incumbent and Clerks would not be parties,[11] so that there would be no presentation by the various involved persons of all the facts relating to the dispute, including custom, practice and usage, and the court would be unable to make a binding construction as to which collective bargaining agreement is applicable, or whether both are applicable. Cf. *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, 567; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 305-306 (C.A. 7, 1951).

Petitioners have been unable to cite a single case supporting their theory that a district court has no jurisdiction to require the Board to give the due notice specified in Section 3 First (j). In contrast, on numerous occasions, this Court has held that the district courts do have jurisdiction to enforce the commands of the Railway Labor Act. See, *e.g., Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federa-*

11. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶68,671 (N. D. Ill., 1954); findings 165, 169, p. 87,277. Conversely, if the Clerks should sue to enforce a sustaining award, the incumbent and Telegraphers would not be parties.

tion, 300 U. S. 515; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 207; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Graham* v. *Brotherhood*, 338 U. S. 232. Those decisions fully support the district court's jurisdiction here.

Petitioners make the tenuous claim that this case does not involve a case or controversy within Article III, Section 2, Clause 1 of the Constitution (Br. 15-16). However, as in *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, the respondents are not seeking an advisory opinion. The Board has already refused to give the requisite notice and, as in many other cases in which the courts have granted relief, the respondents are asking the courts to enforce one of the statutory commands of the Railway Labor Act. As explained in *In re Summers*, 325 U. S. 561, 566-567, a case exists within the constitutional sense when any question respecting the Constitution or laws of the United States is in a form on which the judicial power may act, where plaintiffs are seeking a declaration "on rights as they stand," and where there is an actual controversy over an issue. Those tests are satisfied here, for the courts are capable of requiring the Board to give the due notice that it has thus far denied, the respondents are seeking a declaration on rights as they stand, and there is an actual controversy over the issue whether the Board must give due notice to the incumbent and his union under Section 3 First (j) of the Railway Labor Act. As the petitioners themselves conceded in their brief in the court of appeals (at pp. 20-21):

> "where Congress enacted a positive command in the Railway Labor Act, it must have intended that there be some remedy to rectify violations of the command and therefore intended a *pro tanto* modification of pre-existing law denying jurisdiction of the only relief that could afford a remedy."

That is the very principle which applies to this case.

If administrative agencies are permitted to hold proceedings without observing the basic notice and hearing requirements set forth in the governing statutes enacted in conformity with the due process clause, it will be a shocking and backward step in the field of administrative law. To insure proper respect and a willingness to comply with their authority, administrative agencies should be required to live up to the fair standards which Congress has delineated for them.

D. No Other Adequate Relief Is Available.

It is asserted (Br. 14, 26) that this claim might still be decided in the carrier's favor on the merits. But such an award would be a mere scrap of paper, utterly worthless for lack of notice to the incumbent and his union. It would serve as no protection to the carrier.

Even if a "denial award" should issue in the carrier's favor, the member of the Telegraphers who is seeking to obtain the work being performed by the incumbent Shears could then file a claim before the Board, perhaps first obtaining a judgment that the denial award is void for want of notice. Cf. *Elgin, J. & E. R .Co.* v. *Burley,* 325 U. S. 711, 738, where the Court stated:

> "• • • an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by § 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest."

In *Kirby* v. *Pennsylvania R. Co.,* 188 F. 2d 793, 798 (C.A. 3, 1951), the court said:

> "The notice problem has arisen before the Supreme Court as part of the question of whether an award of the Board in favor of the carrier was a bar to court action regarding the same dispute by an individual employee. The Court held that it was no bar unless notice and opportunity to be heard before the Board had been accorded the employee, or unless he had authorized the union to represent him. Elgin, Joliet & Eastern R. Co. v. Burley, supra."

If the Telegraphers' claim were denied on the merits, they too would feel free to file an identical claim again, for the award against them would be void for failure to comply with Section 3 First (j). Past experience teaches that such identical claims would be filed. Cf. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 304 (C.A. 7, 1951).

A void denial award simply would not protect a carrier from subsequent litigation and administrative proceedings. If the Board is permitted to render a void denial award, this claim will not be settled for years although the Railway Labor Act was adopted for "the prompt and orderly" settlement of disputes (Section 2(5)). Moreover, as in many other cases where union claims have been denied, strike threats might well be exerted against the carrier. Cf. pp. 5, 24-25 and 32 of the 16th, p. 5 of the 17th and 18th, and pp. 5, 21, and 23 of the 19th Annual Reports of the National Mediation Board for 1950, 1951, 1952 and 1953; *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954) finding 127, at p. 87,272. It is therefore idle fancy to contend (Br. 14, 26) that a denial award would afford the carrier adequate relief. Instead, a mandatory injunction requiring the Board to give due notice is the only means of assuring a valid award settling this claim by the Telegraphers to work being performed by a member of the Clerks.

As recognized in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 798-799 (C.A. 3, 1951), the carrier is entitled to the rendition of a valid award. The Act envisages "final and binding" awards (Section 3 First (m)). In order that the Board can proceed to render a valid award, the complaint prays that the Board be directed to serve due notice (R. 32). The petitioners should welcome the serving of due notice so that a valid award may issue.

Unless the incumbent and the Clerks are given notice, the Board will, as here, continue to ignore the admonition in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, that the contracts of each union should be read in the light of the other, and in the light of custom, practice and usage under those contracts. If the petitioner Telegraphers' contract were read in the light of the Clerks' contract, that might even strengthen the Telegraphers' claim. Their contractual relations with the carrier antedated the Clerks' by twenty years.

This lawsuit presents the only known means to break this procedural bottleneck. In this respect, the case resembles *Order of Railway Conductors* v. *Swan*, 329 U.S. 520, where the Court stated (at p. 524):

> "We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by §3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation."

Here too judicial guidance is needed to resolve the confusion and delays caused by the failure to observe the command of the Railway Labor Act.

In *Rice* v. *Santa Fe Elevators Corp.*, 331 U. S. 218, the administrative agency might have decided the case before it in favor of the applicant for equitable relief. Nevertheless, this Court held that equitable relief was appropriate, on the ground that further proceedings were "beyond the reach" of the administrative agency (331 U. S. at p. 236). Here also, in the absence of notice, further proceedings before the Board are beyond its reach.

Likewise, in *Hillsborough* v. *Cromwell*, 326 U. S. 620, the plaintiff might have been successful on the merits in the New Jersey courts. Nevertheless, it was held that the federal district court might intervene on the ground of uncertainty as to the adequacy of the State remedy (326 U. S. at pp. 624-626).

In the instant case, the administrative remedy was completely inadequate, for the Board had already determined not to issue notice (R. 46).

The court below pointed out the special circumstances why equitable relief is appropriate here, stating (R. 54-55):

> "To . . . [protect its rights and property the carrier] must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights."

The issuance of a void award against this carrier is no chimera. The Board has already decided not to issue due notice (see p. 37, *supra*), so that any ensuing award would be void. Moreover, the Board has divided evenly on the

merits (R. 46), and a void "sustaining award" will issue against the carrier if the referee's vote is cast in favor of the Telegraphers. There are numerous reasons why in these circumstances the carrier has no other adequate relief from a void award against it. In the first place, the fact that it could defend against a suit to enforce the Board's decision on the ground that due notice was not given affords no real protection. Employees often resort to economic measures to enforce awards rather than risk enforcement suits. See, *e.g.*, *Grand Trunk Western R. R. Co.* v. *American Train Dispatchers Ass'n*, No. 53 C. 1595 (N.D. Ill., decided September 22, 1954); *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), finding 111, p. 87, 269; "Railroad Labor Disputes and the National Railroad Adjustment Board", 18 Univ. of Chicago L. Rev. 303, 318 (1951); p. 23 of the 19th Annual Report of the National Mediation Board for 1953. Carriers should not have to comply with invalid awards to avoid labor unrest and then have to pay retroactively other claimants who subsequently obtain valid awards after due notice has been given. Even if a void award were set aside in enforcement proceedings, accumulated back-pay would be claimed in proceedings to enforce a later valid award reaching the same conclusion. Enforcement suits are normally not filed until nearly the end of the two-year statutory period (Section 3 First (q)), in order to present the carrier with a formidable claim. It is unrealistic for petitioners to minimize the financial harm that might ensue to the carrier, for numerous cases decided by the Board and courts show that this type of case frequently results in enormous claims which build up day by day until the awards are finally entered. For example, in *Missouri-Kansas-Texas Railroad Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N.D. Ill., 1954), the carrier was faced with potential

awards of $578,435 per annum (finding 164, p. 87,276). In Third Division dockets TE-6799 and TE-6800, together with companion claims, the amount was $8400 per month. In the instant case, this claim was filed in 1951. If an award should finally ensue in favor of Telegraphers, they will demand back-pay from 1949, when they claim the work was improperly done by a member of the Clerks. Furthermore, if the carrier should secure reversal of a doubtful award in an enforcement action, the Board would still not issue the proper notice (R. 47, 82, 83; see also Appendix, *infra*, p. 68), and this same action would have to be brought anew.

The brief of the amici curiae suggests (Br. 19) that if the award herein favors the Telegraphers, the carrier could then defend against a claim brought by the Clerks. This suggestion fails to recall that the carrier's submission to the Board contends that the work in question is clerical work (R. 36-37). Moreover, the later claim would be before another referee who would not have the benefit of the Telegraphers' contentions.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the carrier would not be afforded protection in complying with an award in favor of the claimant union. Yet a carrier should be entitled to have this controversy settled once and for all, in one proceeding, in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards. Cf. *Kirby* v. *Pennsylvania Railroad*, 188 F. 2d 793, 799 (C.A.3, 1951). It is grossly unfair for a carrier to be "double-barreled" by having conflicting awards against it, as happened in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C.A.7, 1951), and as threatened here (R. 48).

E. Mandatory Relief Is Appropriate.

Both courts below concluded that relief in the nature of mandamus is necessary to compel the Board to give the "due notice" required by Section 3 First (j) (R. 40, 56). No other means is available to obtain the issuance of notice.

In the absence of notice, not only would the Board be proceeding beyond its power, but any resulting award would be void. Relief in the nature of mandamus is necessary to correct the Board's constant flouting of the statute. As stated in *Allain* v. *Tummon*, 212 F. 2d 32, 35 (C.A.7, 1954):

> "In previous opinions we have commented on the reluctance, or indeed the unwillingness, of the Board to give notice to all 'employees involved' in disputes submitted to it. In the second Hunter case we said, 188 F. 2d 294, 300: 'In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient.' In the Illinois Central case we said, 212 F. 2d 22, 29: 'The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.' From its action in the case at bar it is apparent that the Adjustment Board persists with unabated fervor in its often criticized practice."

In *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 540, the trial court granted a mandatory injunction direct-

ing the petitioner railway "to 'treat with' the Federation and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions * * *.'" The decree was affirmed by the court of appeals and, in turn, by this Court. Although the mandatory provisions of the decree were assailed, Mr. Justice Stone pointed out that the decree was properly devised to enforce a positive requirement of the Act, stating (at pp. 545, 551):

> "Neither the purposes of the later Act [the Railway Labor Act], as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra*, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.
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> "It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority." (Additional citations omitted.)[12]

Similarly here, Section 3 First (j) is "mandatory in form", so that a mandatory injunction is justified to compel the Board to act in accordance with a mandatory provision of the Railway Labor Act, namely, Section 3 First (j). Cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548.

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12. *The Virginian* case was approved in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300-301, and *General Committee* v. *M-K-T Co.*, 320 U. S. 323, 331, 335, on which petitioners rely (Br. 17, 24, 43).

In *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, analogous provisions of the Railway Labor Act were described as follows (p. 207):

> "• • • the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected."

Here Section 3 First (j) is stated in the form of a command, and there is no practical mode of enforcement other than the obtaining of a mandatary injunction. An injunction without mandatory provisions would again leave the Board free to refuse to give due notice to the incumbent and his union, in accordance with its long-time practice of ignoring the statute.

In *Miguel* v. *McCarl*, 291 U. S. 442, the governing considerations for mandamus were set out. The Court stated (at pp. 451-452):

> "In *Roberts* v. *United States*, 176 U. S. 221, this court held that where the proper construction of a statute is clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus. The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. 'But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial although depending upon a statute which requires, in some degree, a construction of its language by the

> officer. Unless this be so, the value of this writ is very greatly impaired.' This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane* v. *Hoglund*, 244 U. S. 174, 181; *Wilbur* v. *Krushnic*, 280 U. S. 306, 318. The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 31, 33."[13]

The duty to give notice imposed upon the Board by Section 3 First (j) is clearly ministerial, so that the Board should be "required * * * to discharge a duty laid upon" it by the statute. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 622-623.

Here the carrier is seeking to accomplish orderly administrative procedure. It is the Board which has departed from the statutory scheme. Moreover, being composed of five carrier members and five labor members, the Board is particularly stubborn in its adherence to partisan concepts. The sanction of the district court is sorely needed to secure compliance with the statute and end the conflict on notice which has existed for so many years. In order to correct

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13. See also *Adams* v. *Nagle*, 303 U. S. 532, 542-543; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187, 188; *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56, 58 (C. A. 7, 1954); *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 54 (C. A. D. C., 1953); *Higginson* v. *Schoeneman*, 190 F. 2d 32, 35 (C. A. D. C., 1951); *Grand International Brotherhood of Locomotive Engineers* v. *Morphy*, 109 F. 2d 576, 578 (C. A. 2, 1940).

Mandatory relief against the National Railroad Adjustment Board was considered appropriate in *Delaware & Hudson R. Corporation* v. *Williams*, 129 F. 2d 11 (C. A. 7, 1942), remanded in view of the death of the referee, 317 U. S. 600; *Patterson* v. *Chicago & Eastern Illinois R. Co.*, 50 F. Supp. 334 (N. D. Ill., 1943); and *Missouri-Kansas-Texas R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954).

the existing confusion in the Board on due notice, to promote uniformity by the Board, and to alleviate the persistent disregard of Section 3 First (j), the Carrier Members urge that mandatory relief is clearly required directing the Board to give notice to the incumbent and his union and to permit them to participate before the Board. The courts below have already recognized the appropriateness of such relief (R. 40, 56).

The case law holding that the Board must observe the due notice provisions of Section 3 First (j) of the Railway Labor Act was developed after years of abuse by the Board. The courts gave the Board ample opportunity to observe the notice requirements of the statute before they found it necessary to act. It was obviously the flagrant violation of the statute over the years that caused the Eighth Circuit to change its views and overrule *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 156 F. 2d 1 (C.A. 8, 1946), certiorari denied, 329 U. S. 758, by *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823. The facts proved in the various due notice cases show that the Board has persistently failed to obey Section 3 First (j) and certainly justify judicial relief. The due notice cases decided by the courts do not mean that anyone can go to court at any time to complain of some procedural irregularity (cf. petitioners' Br. 13). They do mean that the courts have power to enforce the due notice command of Section 3 First (j).

The petitioners' contention (Br. 23, 24) that under the decisions below courts will have to resolve the question of which employees are entitled to due notice, ignores the judicial decisions and awards that have already determined that question (see pp. 13, 43, *supra*). Deadlocks on due notice have been caused not by any confusion as to which

employees should be given due notice but by the obstinate refusal of some Board members to admit that Section 3 First (j) exists. Such deadlocks can be readily resolved by compliance with the decision below. Furthermore, the petitioners' inconsistent contention that the courts can decide due notice issues in enforcement suits filed within two years from the entry of an invalid award (Br. 24-27) is not responsive to the intent of Congress that these matters shall be settled in a prompt and orderly manner (Section 2(5) of the Railway Labor Act).

The right to due notice, which is stated so explicitly in the statute, embodies elemental notions of justice, due process and fair play that would apply even in the absence of statute. To deny those most vitally concerned in a controversy the right to be heard, as petitioners would do, subverts principles fundamental to the administration of the law.

IV. THE WRIT OF CERTIORARI SHOULD BE DISMISSED.

A. Public Policy and Judicial Convenience Do Not Permit the Labor Members of the Board to Seek Review Herein.

The National Railroad Adjustment Board is an administrative body created under Act of Congress. The ten members thereof were named here as defendants in their status as members of the Third Division of the Board (R. 26). The Board appeared in this case (R. 41). The injunction was also entered against the ten individual defendants only "as members of and constituting the Third Division of said Board" (R. 41). The Board did not appeal, nor did five of the members or the referee (see R. 42). The appeal to the court below and the petition in this Court were thus presented by some members of the Board, but not a majority thereof.

Public policy and judicial convenience weigh against allowing a few individual members of a public agency to appeal on their own individual whims. Otherwise, the courts would see a parade of dissenting agency members filing their own petitions for review. For example, recently the National Labor Relations Board has been split on several rulings, with some very bitter dissents. Petitioners here would have this Court say that those dissenters could come into court by themselves and challenge their Board's ruling.

Thus, the petitioning members were only sued and were only enjoined in their capacity as Board members. However, the petitioning members appear here as individuals. In addition, the notice of appeal filed in the district court specifies that the appellants were appealing "from the order enjoining the defendant members" from proceeding further (R. 42), so that the propriety of the injunction against the Board is not before this Court. Therefore, this Court should dismiss the writ of certiorari.

B. The Intervenor Order of Railroad Telegraphers Also Has No Standing to Present the Petition to This Court.

Although the Order of Railroad Telegraphers intervened in this action in the district court (see R. 4), the order of the district court did not run against the Telegraphers and did not require them to do anything or forbid them from doing anything (R. 41).

This Court has long held that intervenors cannot appeal from an order which does not run against them just because the order will probably affect them indirectly. Very similar to this situation is *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577. There the City of Chicago intervened

in a federal district court action to enjoin administrative action, just as the Telegraphers intervened in the present action. There, as here, the district court issued a preliminary injunction. There, as here, the administrative body and the governmental authorities chose not to appeal. There, as here, the intervenor sought to appeal, asserting that the injunction hurt it, since there the injunction was against the enforcement of certain transit rates within the City. This Court dismissed that appeal because "the City of Chicago has no separate standing which entitles it to appeal from the decree" (284 U. S. at p. 578). This conformed to the long-held view of this Court that an intervenor must be more than indirectly interested to have standing to seek appellate review.

In another case, *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, the appealing party intervened in a federal court injunction proceeding, as the Telegraphers have intervened here. There the intervenor sought review of the order, arguing that the order directly affected its chances in an administrative proceeding. This Court held that the intervenor did not have "such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal," and therefore dismissed the appeal (321 U. S. at p. 634).

The intervenor Telegraphers cannot show that they have been aggrieved in a legally recognized way. They have asserted in their brief that bringing the Clerks and D. A. Shears into the Board proceedings will have no appreciable effect upon said proceedings (Br. 27-38). Therefore, they cannot now assert that they are aggrieved because the order below will interfere with the presentation of their claim before the Board. They cannot say they have been aggrieved by any delay to their claim since their vice presi-

dent, J. W. Whitehouse, is on the Board and can switch his vote so that the Board will properly proceed with this claim at any time it behooves the Telegraphers. It should be reiterated that no order has been entered against the Telegraphers.

This intervenor is unable to point to any separate standing to seek review here. Its legally recognized independent rights have not been violated by this preliminary injunction. Accordingly, as to the Telegraphers also, this Court should dismiss the writ of certiorari.

CONCLUSION

For the foregoing reasons, the Carrier Members of the Board believe that the judgment of the court of appeals, which epitomizes the views of 26 federal judges, should be affirmed or that the writ of certiorari should be dismissed.

Respectfully submitted,

KENNETH F. BURGESS,
WALTER J. CUMMINGS, JR.,
Attorneys for Respondent Carrier Members, National Railroad Adjustment Board, Third Division.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

February 1955.

APPENDIX

Special Concurring Opinion In Award No. 6683. Docket No. CL-6614.

This is one of a line of four consecutive Awards entered by the Third Division on the same date. The full Opinion is found in Award No. 6680.

The referee makes reference in the full Opinion to what he calls the "Illinois Central case" and the "Allain case". These are respectively reported in 212 F. 2d 22[illegible]d 212 F. 2d 32. He points up the Court's language in the former case wherein it said, "At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits with an opportunity for all parties to be heard." And in all four of these Awards he has dismissed the claim. Therefore, we think that our Awards in this series are compatible with the first alternative expressed in the Opinion of the United States Circuit Court of Appeals.

This Board (Division) is a bipartisan creature of statute and is composed of five Carrier Members and five Labor Members. It employs, pursuant to the Railway Labor Act, an Executive Secretary. While its duty to give due notice is clearly expressed in the statute, the subject has proven to be of a most litigious character. The Executive Secretary has followed the practice of not giving due notice in those instances where it has been ordered by a referee Award unless the Labor Members' Chairman joins in giving him such direction. That direction has been withheld by the Labor Members of this Board irrespective of the many Court Cases holding the giving of notice to be our non-discretionary duty.

We can only look to the law and its interpretation by the Courts for our guide in the administration of our duty. Where that function is checked in the face of such a clear expression of our duty as lies before us in many cases, we are impelled to explain our position and concur in this referee's action, which we think is to "proceed no further". Similarly, when an Award has the effect of ordering due notice, and the actual giving of it is withheld, we are again of the opinion that we are still "proceeding no further". Surely, there can be no accumulation of liability under any claim beyond the point where this Board has failed to comply with what has been so effectively enunciated as its statutory duty.

E. T. HORSLEY,
R. M. BUTLER,
W. H. CASTLE,
C. P. DUGAN,
J. E. KEMP.

June 18, 1954.